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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 944

ADD EVANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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To the United States Court of Appeals For the Sixth Circuit.

Add Evans prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on March 26, 1957.

OPINION BELOW.

The District Court did not render an opinion. The Memorandum Opinion of the Court of Appeals is not yet reported. A copy of same is annexed hereto at page 10.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 26, 1957 (p. 12, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

(1) Is the determination by a U. S. Commissioner that there is probable cause for the issuance of a search warrant conclusive?

(2) Did the U. S. Commissioner establish there was probable cause for believing the existence of the grounds upon which the search warrant was issued and was there probable cause for the issuance of the search warrant?

(3) Was the search warrant illegally executed, in that it was issued by one U. S. Commissioner and returned to another?

CONSTITUTIONAL PROVISION AND RULES OF CRIMINAL PROCEDURE INVOLVED.

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41(c), Federal Rules of Criminal Procedure, provides:

> "*Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property speci-

fied. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

Rule 41(f), Federal Rules of Criminal Procedure, provides:

"*Return of Papers to Clerk.* The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized."

STATEMENT.

Petitioner was indicted September 19, 1955, by the Grand Jury of the United States District Court for the Eastern District of Tennessee; said indictment being in two counts, first of which charges possession of distilled spirits in containers which did not have the affixed stamps denoting the quantity of spirits therein and evidencing payment of taxes due thereon. The second count alleges the concealment of said spirits in a place other than a bonded warehouse (R. 1a). A sentence of two years imprisonment was imposed by the District Court on each count of the indictment, the sentence to run concurrently (R. 8a), which sentence was affirmed by the U. S. Court of Appeals for the Sixth Circuit (R. 117a).

Prior to arraignment, petitioner moved to suppress the evidence obtained by a search conducted by federal officers under a warrant (R. 2a-4a). The now pertinent portion of the motion to suppress the search asserts that the evidence was obtained in violation of the petitioner's constitutional rights in that:

(1) There was not probable cause for the issuance of the search warrant;

(2) There was no such person as "Carl Jones," the affiant who made the affidavit in support of the search warrant;

(3) The warrant was illegally and unlawfully issued in that it was not ascertained by the commissioner whether the affiant was a reliable person, in that no effort was made to ascertain affiant's true identity, or to ascertain the truth or falsity of what affiant said in the alleged affidavit in support of the search warrant;

(4) The affidavit in support of the warrant does not state facts sufficient to establish probable cause, in that it states conclusions rather than fact;

(5) The warrant was illegally executed, in that it was issued by one U. S. Commissioner and returned to another.

The District Court overruled the motion to suppress and found the defendant guilty (R. 6a). Motion for a verdict of acquittal or in the alternative for a new trial was filed (R. 5a), and overruled (R. 6a). An appeal was perfected to the U. S. Court of Appeals for the Sixth Circuit, where the questions presented here were presented there.

The affidavit upon which the search warrant was issued sets forth the following (R. 17a):

> "On August 31, 1955, I was at the Add Evans house described above. In a back bedroom, I saw 47 cases of moonshine whiskey in half gallon fruit jars stacked against the walls. I also saw six, one hundred pound bags of sugar in the same room."

On September 2, 1955, a person voluntarily came into the office of the Alcohol and Tobacco Tax Unit, U. S. Treasury Department, Knoxville, Tennessee, and stated

that he desired to give information against this petitioner and four other persons (R. 24a). No officer of this Alcohol and Tobacco Tax Unit knew this person, nor where he lived, and he had not previously given government officers information of alleged violations. Officer Tubb said he had seen affiant once or twice in downtown Newport, Tennessee. Affiant was not known to the officer as a person engaged in the illicit liquor business. None of the officers could testify that affiant was a reliable person. The officers typed up the affidavit and the warrants and then called the United States Commissioner Duggins to their office. The Commissioner did not question the affiant as to his true identity; made no examination of any papers to establish his identity; made no inquiry of affiant so as to ascertain the truth or falsity of the statement in the affidavit; nor did he question affiant as to how affiant knew what was stated in the affidavit. He simply asked the man if the matters in the affidavit were true and if his name was "Carl Jones," and when he said they were, he swore him to the affidavit, put his seal on it, and left.

After the search warrant was served, the return was made to Commissioner McSween at Newport, Tennessee, and not to the issuing commissioner at Knoxville, Tennessee.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that the determination by the U. S. Commissioner that there is probable cause for the issuance of the search warrant is conclusive unless his judgment is arbitrarily exercised.

(2) In holding that there was probable cause for the issuance of the search warrant.

(3) In holding that the search warrant was properly returned when it was returned to a commissioner who did not issue the warrant.

REASONS FOR GRANTING WRIT.

(1) Under the National Prohibition Act, United States Commissioners were charged with making decisions on motions to suppress evidence. Under said National Prohibition Act, the commissioner heard evidence both from the defendant and the government, and determined whether the evidence should be suppressed. For this reason there are reported cases holding that a determination by a United States Commissioner of probable cause for the issuance of the search warrant is conclusive unless his judgment is arbitrarily or erroneously exercised. The Court of Appeals in the instant case follows this line of decision under the National Prohibition Act, *Gracie v. United States* (C. C. A. 1), 15 F. 2nd 644.

Rule 41(e) Federal Rules of Criminal Procedure provides for the making of motion for the return of property and to suppress evidence. One of the grounds set out in that rule for the suppression of evidence is:

> "(4) There was not probable cause for believing the existence of the grounds on which the warrant was issued * * *."

and the rule further provides:

> "The judge shall receive evidence on any issue of fact necessary to the decision of the motion."

It was the duty of the District Court under Rule 41, Federal Rules of Criminal Procedure to hear the evidence as to whether the affiant was a fictitious person, and whether he was a reliable person, and whether there was

probable cause for believing the existence of the grounds upon which the warrant was issued.

This question is a substantial one and is of great and widespread importance. There has been no decision of this Court on the question since the Federal Rules of Criminal Procedure were adopted. To issue search warrants on the affidavit of fictitious affiants nullifies the Fourth Amendment and the provisions of Rule 41, Federal Rules of Criminal Procedure. The perfunctory action of the United States Commissioner in this case wherein he merely asked affiant his name and if the affidavit was true, and made no further inquiry to establish probable cause, likewise nullifies the protection afforded by the Fourth Amendment and Rule 41, Federal Rules of Criminal Procedure.

(2) The United States Commissioner did not perform his duty as required under Rule 41, Federal Rules of Criminal Procedure, in that his actions were not sufficient to establish probable cause. The United States Commissioner stands as a bulwark between over-zealous officers and the general public, so as to see they are protected against unlawful searches and seizures. *United States vs. Wallace and Tiernan Co.*, 336 U. S. 793.

The commissioner in the instant case did practically nothing to see that the constitutional rights of this petitioner and the four others against whom search warrants were issued at the same time were protected. His action in failing to perform that duty was tantamount to a search without a warrant.

Furthermore, the affidavit stated conclusions, rather than facts. The statement of the affiant that the whiskey was "moonshine whiskey" was a conclusion and not a factual statement. The words "moonshine whiskey" do not connote in law "distilled spirits in unstamped con-

tainers" and before there could be a federal violation there would have to be a showing that the distilled spirits were in containers which did not bear affixed thereto stamps denoting the quantity of spirits and evidencing the payment of Internal Revenue taxes due thereon.

The search warrant in this case was issued by a Commissioner for the Northern Division of the Eastern District of Tennessee, and on its face directed its return to him. The return was not made to him, but to a Commissioner in the Northeastern Division of Tennessee. Rule 41(c), Federal Rules of Criminal Procedure provides:

> "* * * It (speaking of the search warrant) *shall* designate the district judge or the commissioner to whom it *shall* be returned." (Matter within parenthesis and italics supplied.)

Rule 41(f) provides:

> "The judge or commissioner who has issued a search warrant *shall* attach to the warrant a copy of the return, inventory and all other papers in connection therewith and *shall* file them with the clerk of the district court for the district in which the property was seized." (Italics supplied.)

The word "*shall*," as used in Rule 41, leaves no ambiguity as to what is to be done. Congress and this Court had a reason for having the rules made as they are, and the violation of the rules in the instant case with respect to the warrant vitiated the warrant.

We have found no reported cases of this Court on any of the questions raised by the specifications of errors made herein.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 26, 1957.)

Before SIMONS, *Chief Judge*; MCALLISTER and STEWART, *Circuit Judges*.

PER CURIAM. This is an appeal from a judgment convicting appellant of illegal possession and concealment of distilled liquor in violation of the federal law. The case was tried by the district court, a jury having been waived. The principal claim of error is that the district court erred in not suppressing evidence obtained by a search warrant. Appellant contends that the search warrant was issued without probable cause. It appears from the evidence that the case had its inception, when a man who stated that he was Carl Jones, came to the headquarters of the federal liquor law enforcement officers and stated that he wished to give information that appellant had in his possession 47 cases of moonshine whiskey in the back bedroom of his home. Jones signed an affidavit to this effect; and thereafter a search warrant was issued by the United States Commissioner. Upon a search of appellant's bedroom, the moonshine whiskey was found, seized, and thereafter used as evidence to convict appellant.

Appellant submits that no inquiry was made of Jones to ascertain whether that was really his true name or where his place of residence was or whether he was a reliable person.

The Commissioner testified that he asked the affiant whether he was Carl Jones and received the reply that he was. He further testified that he asked him whether he understood the contents of the affidavit and whether

it was true, and received an affirmative reply. The Commissioner then administered the oath to Jones, who thereafter signed the affidavit, upon which the search warrant was based. One of the enforcement officers testified that he had seen Jones on several occasions in Newport, Tennessee, and that whenever he saw him he was with other persons who were in the liquor business.

After the issuance of the search warrant and on appellant's motion to suppress the evidence found as a result thereof, Judge Robert L. Taylor reviewed the action of the Commissioner and found that there was probable cause for the issuance of the warrant. Probable cause for the issuance of a search warrant exists where circumstances before the officer are such as to cause a man of reasonable prudence to believe that an offense is being committed. *United States v. Celedonia,* 95 F. Supp. 228. The Commissioner must exercise his own judgment as to whether the facts in the affidavit constitute probable cause for issuance of a search warrant; and his determination is conclusive, unless his judgment is arbitrarily exercised. *Gracie v. United States,* 15 F. (2d) 644 (C. C. A. 1). In the instant case there is no showing of abuse of discretion on the part of the Commissioner or on the part of the district court.

As to the validity of the warrant challenged by appellant under Rule 41(f) of the Federal Rules of Criminal Procedure, on the ground that it was issued by the Commissioner of the Northern Division of the Eastern District of Tennessee and returned to the Commissioner of the Northeastern Division of the Eastern District of Tennessee, we consider this contention to be without merit, since both Commissioners are appointed for the Eastern District and may properly act in any Division of the District. Moreover, the return of a search warrant is a ministerial

act and any failure therein does not void the warrant. *Rose v. United States*, 274 F. 245, (C. C. A. 6.)

In accordance with the foregoing, the judgment of the district court is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 26, 1957.)

Before SIMONS, *Chief Judge*; MCALLISTER and STEWART, *Circuit Judges*.

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

THOMAS F. MCALLISTER,
United States Circuit Judge.